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SUPREME COURT, U.S.

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1980

No. 79-1734

ROBERT PARRATT and
FRANCIS LUGENBILL,

Petitioners,

v.

BERT TAYLOR, JR.,

Respondent.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

PETITIONERS' BRIEF IN OPPOSITION TO MOTION TO DISMISS

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INTRODUCTION

On October 20, 1980, this Court found this case worthy of consideration and granted a Writ of Certiorari. The petitioners' brief on the merits and six amicus briefs representing the interests of 30 states and one private organization were filed with this Court on or before December 4, 1980. Within a week of these filings the respondent filed his motion to dismiss this case as moot.

The respondent alleges, and the petitioners have no present means of verifying, that he has been paid a sum of money equal to the amount of the judgment questioned in this case. The money was allegedly paid by a person "not a party to the action."[1] Petitioners can assure this Court the money in question did not come from them, anyone acting with their permission or on their behalf.

The petitioners continue in their desire to have the issues raised by their petition for certiorari resolved by this Court, and strongly urge that the respondent's motion to dismiss be denied.

ARGUMENT

I.

THIS CASE IS NOT MOOT.

A.

The facts presented by the respondent do not effect the relationship of the parties or the judgment now before this Court. At best the respondent's allegations pray this Court to provide them an <u>opportunity</u> to alter the status of this case in the future.

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[1]The petitioners have been able to verify that the offer to pay the sum in question was extended to respondent's counsel by attorney Robert M. Mark, an associate with the law firm of Sonnenschein, Carlin, Nath and Rosenthal, Chicago, Illinois. Mr. Mark and other representatives of that firm have refused to discuss the details of the offer with petitioners' counsel but have provided conflicting information regarding whether the sum in question comes from Mr. Mark, the firm or an unnamed client of the firm.

The judgment challenged remains a potential source of liability for the petitioners, and we question the respondent's ability or authority to dismiss this matter once it has gone to judgment. In essence, the respondent alleges that he is now prepared to release the judgment against the petitioners. This would amount to a satisfaction of the judgment in question and would not effect its precedential value.

It is the law of this case, and not $23.50, which prompted the Petition for Writ of Certiorari in this case. The fact that the respondent has now found an unnamed benefactor to whom it is worth at least $23.50 to see that the issues presented here are not considered by this Court, should not obscure the fact that nothing has materially changed in this case. The relationship between the respondent and the petitioners is no different today than it was when the Writ of Certiorari was granted. The respondent is simply $23.50 richer.

The question of whether the respondent has any right under 42 U.S.C. §1983 to the judgment presently before this Court remains significant and worthy of consideration and resolution by this Court.

B.

We note the respondent cites no authority in support of his argument that the facts he alleges moot this case. We believe this lack of cited authority clearly reflects the lack of that proposition's merit.

This situation does not fall within the normal concepts of mootness which underlie this Court's Rule 53. No accord or resolution has been reached between the parties to this case, nor do the petitioners unilaterally desire this case dismissed. No party to this action is now deceased.

This case does not represent a situation mooted by the passage of time. E.g., Nebraska Press Assoc. v. Stuart, 427 U.S. 539 (1976); Weinstein v. Bradford, 423 U.S. 147 (1975). It does represent a unique attempt by parties not before this Court to remove a case from the docket.

II.

In Southern Pacific Terminal Co. v. Interstate Commerce Commission, 219 U.S. 498 (1911), this Court first announced the proposition that questions "capable of repetition, yet evading review" should not be denied an opportunity for redress. Assuming for the moment that the respondent's allegations do present a question of mootness, we believe this case clearly raises the same public policy considerations which led to the result reached in the case above.

A.

ISSUES CAPABLE OF REPETITION

The issues in this case are clearly capable of repetition. Petitioner Parratt continues in his position as Warden of the Nebraska State Penitentiary and inmate claims for property lost or destroyed in that institution continue to arise. Not only is petitioner Parratt's exposure to liability under the reasoning of the judgment in this case capable of repetition locally, but nationally these questions continue to arise with regularity. Including this case, Writs of Certiorari have been granted on the negligence issue raised by this case three times in the last three years. Procunier v. Navarette, 434 U.S. 555 (1978); Baker v. McCollan, 443 U.S. 137 (1979). The issues presented by this case are clearly capable of repetition.

B.

ISSUES EVADING REVIEW

The issues presented by this case are also likely to evade review. One of the issues presented by this case is that the amount in controversy may be de minimus under the Fourteenth Amendment. The amounts at issue in prisoner property loss claims are generally small. See, Brief of the State of New Jersey as Amicus Curiae, p. 5.

Yet if we assume this case is moot, as argued by the respondent, it is moot solely due to the desire of a person or persons unknown to render it so. Although the motivations of these persons may be unarticulated, their goals are obvious.

They do not want this case considered and resolved by this Court. If they are successful in their attempt to buy this case off of this Court's docket, there will be nothing to prevent similar actions in the future. Their expenses were negligible. The same pressing issues could repeatedly be removed from this Court's consideration and the matter will thus effectively evade review.

III.

CONSTRUCTIVE CLASS ACTION

The petitioners are officials and employees of the State of Nebraska's prison system. As such they are constantly exposed to the possibility of being named as a defendant in actions brought pursuant to 42 U.S.C. §1983. Yet as defendants the petitioners have no means of resolving their respective rights under 42 U.S.C. §1983, regardless of the similarity of their situation to governmental defendants elsewhere, except as individuals.

This Court now has before it the amicus curiae briefs of 30 states and one private entity, all representing interests similar to those typified by the individual petitioners present here. In effect, this Court now has before it a constructive class of persons similarly situated who may practically join together only in this forum to urge the vindication of their mutually held rights and interests.

The proposition that this Court will continue to hold and review classes raising issues significant to a class regardless of the changing status of individual members of that class is well recognized. Sosna v. Iowa, 419 U.S. 393 (1974); Roe v. Wade, 410 U.S. 113 (1973); Dunn v. Blumstein, 405 U.S. 330 (1972).

The same public policy considerations which led to the decisions in the cases noted above strongly mitigate in favor of the retention of this case upon the docket of this Court. Nowhere but in this forum may issues of the significance of those presented by this case be effectively resolved. The

split of authority among the circuit courts noted in our Petition for Writ of Certiorari as well as the interest expressed by the amicus curiae before this Court cry out for a resolution of these questions. All involved deserve an interpretation of the rights and remedies afforded by 42 U.S.C. §1983 which may be applied uniformly throughout this country.

IV.

NEED TO RESOLVE SIGNIFICANT QUESTIONS

This Court has also recognized the need (if not the necessity) of resolving pressing issues regardless of arguments that a case may be moot. Whether a case is to be removed from the docket of this Court as moot rests within the discretion of this Court. In Gilligan v. Morgan, 413 U.S. 1 (1973), the record clearly established that none of the party plaintiffs or defendants had a current interest in the issues raised by the case.

> Some basis, therefore, exists for a conclusion that the case is now moot; however, on the record before us we are not prepared to resolve the case on that basis and therefore turn to the important question whether the claims alleged in the complaint are justiciable.

Id. 413 U.S. at 5. Before this Court the practical necessities of resolving important questions should be given precedence over technical concepts of mootness. Richardson v. Ramirez, 418 U.S. 24 (1974). A heavy burden is placed upon a party seeking to moot a case before this Court to show that the issues raised are not likely to recur or the case will be retained to vindicate the "public interest in having the legality of the practice settled." United States v. W. T. Grant Co., 345 U.S. 629, 633 (1953).

42 U.S.C. §1983 is uniformly applicable to all who have come forward seeking a resolution of these issues. This case is confined to a sufficiently specific factual situation that a decision here on the merits would effectively eliminate the necessity for future repetitious litigation. 42 U.S.C. §1983 represents established legislation which is not currently subject

to experimentation, change or development by either the legislative or executive branches of government. All of these factors lend weight to the conclusion that this case should be retained. Note: Mootness in the Supreme Court, 88 Harv.L.Rev. 373 (1974); Annot. 44 L.Ed.2d 719 (1976).

V.

PUBLIC POLICY CONSIDERATIONS

Finally, we believe the means employed by the respondent and his clandestine supporters raise significant issues of public policy in the administration of this Court's docket. Those persons[2] spearheading this attempt to remove this case from the docket have expressed the opinion to petitioners' counsel that this is not the kind of case this Court should be deciding. They therefore have altruistically, albeit anonymously, moved to assist in relieving this Court of that burden.

This type of thinking completely ignores the fact that this Court has already reviewed this case on the Petition for Certiorari and deemed it worthy of the time and effort necessary to review it on the merits. The respondent's allies apparently view the decision of this Court to grant certiorari as erroneous and have expressed to petitioners' counsel their further belief that delivering a check for $23.50 plus interest to respondent's counsel was the most fiscally expenditious means available to correct that error. The presumptuousness of their thinking is impressive, and if appropriate could have denied us such legally significant rulings as that in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), which involved a similarly "insignificant" sum.

This Court, the petitioners and the public should have a right to know who is attempting to influence the workings of this Court. If there are persons who believe that our Petition for Certiorari was improvidently granted or that the petitioners should not prevail on the merits they certainly are afforded

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[2]See, footnote 1.

the opportunity to express those beliefs as amicus curiae before this Court. In that posture both the strength of their logic and the virtue of their motivations may be evaluated and debated openly. To date, both the petitioners and this Court have been denied the opportunity to make such an evaluation.

Public confidence and professional respect for this Court hinge to a great extent upon the fact that an opportunity is afforded in this forum for a full airing of divergent viewpoints as they might affect decisions which will always have significance beyond the parties directly involved. To allow the respondent to succeed on his motion to dismiss we believe would depreciate these essential values.

The question is whether this Court or unnamed third parties are to control the docket of this Court. The answer we hope will lead to the conclusion the respondent's motion should be denied.

CONCLUSION

For the reasons above we urge this Court to deny the respondent's motion to dismiss and allow this case to proceed to a resolution on its merits.

Respectfully submitted,

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	)	
	)	No. 79-1734
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	)	
v.	)	CERTIFICATE OF PERSONAL SERVICE
	)	
BERT TAYLOR, JR.,	)	
	)	
Respondent.	)	

I hereby certify that three copies of the Petitioners' Brief on the Merits have been served upon the respondent by mailing said copies, first class postage prepaid, addressed to the respondent's attorney, Mr. Kevin Colleran, 1900 First National Bank Building, Lincoln, Nebraska 68509, on this 24th day of December, 1980.

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